No. 11759.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS W. SCOTT,

Appellees.

APPELLEES' BRIEF.

JAMES V. BREWER,
425 Fidelity Building, Los Angeles 13,
Attorney for Appellees.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

Statement of Questions of Law Involved.

Appellant predicates its appeal on the following legal contentions:

(1) That the evidence showing negligence by the pilot of appellee's airplane was such that the trial court erred in not finding appellee negligent as a matter of law;

(2) That the evidence on the issue of contributory negligence of appellant was such that the trial court erred in not finding as a matter of law that appellant's acts did not constitute contributory negligence.

We believe that the evidence amply demonstrates that neither of the appellant's legal contentions are applicable to this case because there is insufficient evidence to show as a matter of law that the pilot of the appellee was guilty of negligence in failing to observe the government plane, and also because there was substantial evidence to show that the government was guilty of contributory negligence in several respects which would have barred its recovery in any event.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

TEXTBOOKS

No. 11759.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and THOMAS W. SCOTT,

Appellees.

APPELLEES' BRIEF.

Statement of the Case.

Appellant appeals from an adverse judgment after a jury verdict in favor of the defendant in an action brought by the appellant to recover the sum of $10,589.61 as damages to a government owned airplane, resulting from a collision with an airplane owned and operated by appellee. At the time this collision occurred, on November 11, 1943, at the Los Angeles Municipal Airport, that airport was under the supervision of the Civil Aeronautics Authority, an agency of the United States Government, whose employees operated the air traffic control tower.

It is clear the jury found against the Government because of the Government's own contributory negligence or because it found that there was no negligence on the part of the operator of appellee's airplane. Either of these grounds would be sufficient to sustain the judgment and we believe that there is substantial evidence to support both of them.

Statement of Facts.

Taking the evidence which is favorable to appellee and supports the judgment as we are permitted to do, it appears that on November 11, 1943, at the Los Angeles Municipal Airport, Los Angeles, California, on a diagonal runway, which is known as No. 22, a collision occurred between a P-51 airplane [R. 28, 30, 48, 62, 83, 98, 104, 130, 134, 141] having a 37-foot wing spread [R. 33, 65, 71], owned [R. 23] and operated by the plaintiff [R. 31], and an S.B.D. airplane, having a 42½-foot wing spread [R. 63, 65], owned and operated by the defendants [R. 48], whereby damage in the sum of $10,589.61 occurred to plaintiff's airplane [R. 25, 26].

The Los Angeles Municipal Airport consisted of two main runways which are 300 feet wide, macadamized strips running the length of the field, parallel to each other but separated by a clear plot of ground. Diagonally, from the four corners of the field, macadamized runways 150 feet wide bisect the main runways [Pltf. Ex. 1].

The Los Angeles Municipal Airport, at the time of the accident, was managed by employees of the City of Los Angeles. The United States Government was a tenant of the City of Los Angeles, as were many others, including the Civil Aeronautics Authority, an agency of the Government, whose employees operated the air traffic control tower and had complete charge of all air and ground traffic over and on said airfield, and in the air traffic pattern for 25 miles around said airfield [R. 78-81, 102, 103, 121, 122].

A. W. Pitcairn, the operator of the plaintiff's P-51 airplane, although employed by the North American Aviation Company as an experienced pilot, was at the time acting as an agent of appellant, authorized to make test flights for the Government [R. 31].

On November 11, 1943, the day of the accident, Pitcairn, since deceased [R. 46, 73], was assigned to make a test flight for the Government to determine the air flow characteristics of the coolant scoop of the P-51 aircraft, the airplane involved in the collision which is the subject of this litigation [R. 31]. This was alleged in the complaint and during the trial by the appellant, and he was thus an agent of the Government.

In accordance with custom, practice, and usage at the Los Angeles Municipal Airport, the air traffic control tower was informed that said test was to be made. It was the custom, practice and usage that in this type of test the plane to be tested would be towed to its starting point rather than taxied under its own power because dust blown by the propeller upon taxiing the plane would be thrown into the scoop, which would close up the rake openings, thereby nullifying the test [R. 31, 32, 33]. This was true also upon landing, and to prevent this happening when the plane wheels touched the ground the pilot would cut the motor and coast down the main runway to the intersection of the diagonal runway, turn down the diagonal runway and park, after having requested, before landing, that the control tower send for the tow tractor to come out and tow the plane [R. 33, 39-41]. The trac-

tors customarily used for towing planes used in this type of test were stored beneath the control tower [R. 40].

The plaintiff's P-51 aircraft was towed by a tractor out onto the landing strip, whereupon it took off for its test flight [R. 31, 33]. The P-51, on its return to the field, was ordered by the air traffic control tower to land on the main runway 25L [R. 44, 106, 114] which was to the left and parallel to the main runway 25R [Ex. 1], *and proceed to the parking ramp at the end of the field* [R. 116]. Pitcairn, the pilot of the P-51 airplane, immediately cut off the motor and coasted down the main runway to the intersection of the diagonal runway, and then turned to the left and parked on the right side of diagonal runway 22 near the edge of the runway. The evidence is in conflict whether the P-51 was parked on the runway with its wheels on the edge of the runway and its right wing extending over the grass alongside of the runway [R. 44, 45, 68-70], or whether it was parked entirely on the runway with its right wing approximately twenty feet from the edge of the runway [R. 84, 85, 131, 135, 136]. Pictures introduced in evidence indicated it was parked entirely within the runway.

While in the air Pitcairn, the pilot of the P-51 airplane, radio-ed a request to the air traffic control tower for a tractor to meet him and tow the P-51 airplane to the parking area [R. 118, 122]. However, approximately ten minutes had elapsed from the time of the stopping of the P-51 on the runway and the time of the collision between the SBD and P-51 airplanes [R. 77, 132, 135, 142].

Thomas W. Scott, one of the defendants, was operating a Douglas SBD airplane which collided with the P-51 airplane. He was employed by Douglas Aircraft Company to conduct regular production test flights on SBD airplanes. He was conducting such a test flight with the SBD airplane involved in this colliison [R. 48, 49, 130, 135].

While Scott was still in the air the operator in the air traffic control tower gave Scott permission to land his SBD airplane [R. 50, 55, 117, 122], and, pursuant thereto, he landed the SBD airplane on runway 25R, coasted down to diagonal runway 22, then turned left into said diagonal runway 22, until he approached a point north of the main runway 25L [R. 49, 51, 52, 123, 124, 136, 138, 142]. Scott held his position there, and watched another airplane take off the main runway 25L [R. 53]. The control tower then gave him permission to cross the main runway 25L [R. 50, 51, 59, 117]. Scott taxied the SBD airplane across the main runway 25L in a hurry [R. 53, 63, 64], and upon entering diagonal runway 22 on the other side of the main runway, he started S-ing (essing) the SBD airplane [R. 53, 54, 133, 136, 138, 142]. Completing his first S turn, he collided with the P-51 airplane parked on the runway [Rep. Tr. p. 51].

Scott testified that he S-ed (essed) so he could see in front of his SBD airplane. He could not remember if he looked all the way down diagonal runway 22, but knew he could see all the way down [R. 53, 54]. He did not remember whether he looked all the way down diagonal runway 22 after stopping at the intersection of the main runway 25L, and the diagonal runway 22 [Rep. Tr. pp. 53, 54]. As Scott taxied down diagonal runway

22 immediately prior to the collision, he could not see directly in front of him because of the nature of the construction of the SBD airplane; the nose was in front of him so that it obstructed his view ahead. However he S-ed (essed) the airplane so that he could get a view of the diagonal runway at alternate intervals [R. 54].

At the time of the accident Scott testified that it was a clear day, but there was a haze [R. 58, 71]. In executing his S turns Scott testified that he turned the SBD airplane first to the left for a distance of twenty-five feet, at an angle of about fifteen degrees from the center, and then to the right about twenty-five feet at about the same angle [R. 64, 66].

The P-51 airplane was painted a brown camouflaged Army color. When Scott landed he was proceeding into the sun. In the direction he was looking there was a background of sand colored or brown hills and black and brown camouflaged buildings. The hills and buildings were at a higher level than the P-51 airplane. The runway was camouflaged with several different colors of paint. The dried grass alongside of the runway where the P-51 airplane was parked was also brown in color [R. 42, 62, 66, 71, 72]. The wingspread was 42 feet on the SBD ship of appellees [Rep. Tr. p. 63].

A minute or two after this collision Scott, the pilot of the SBD airplane, had a conversation with Pitcairn, the pilot of the P-51 airplane. Pitcairn said, "I am glad you cut the switch." After Pitcairn had got off the P-51 airplane, Scott replied: "I am sorry, I didn't see you." Pit-

cairn replied, "I am sorry. I had no business being here. I have been here for about ten minutes. I called for a truck and they haven't come after me yet." [R. 77.]

It was the usual practice and custom to taxi down the center of the runway and Scott was doing that on the day in question [R. 65].

The nose of the SBD Navy plane of appellees was seven or eight feet off the ground and when the pilot was in the pilot's seat he could not look over the front end of the plane and the only way a pilot could look forward was by making "S" turns or fish-tails [R. 65, 66]. The P-51 was lower in height than the SBD [R. 71].

At Los Angeles Municipal Airport it was customary for the control tower operators to notify Scott of obstructions on the runways, and they had quite often done that [R. 71, 72].

The Los Angeles Municipal Airport provided a special parking area for airplanes. It was designated as runway C [R. 60, 71]. and also they were parked on the ramp in front of the tower and administration building [See Ex. 1; R. 115]. Pitcairn in his P-51 had been ordered to proceed to this ramp [R. 116]. The tower was aware of the fact he had disobeyed this order and was instead parked on the runway 22 [R. 119, 120-121] when he cleared Mr. Scott across runway A, the main runway, and into the ramp, down the same runway [R. 121] without warning him of the parked P-51 on the runway [R. 101 to 117; Deft. Ex. "C", Transcription of Tower talks with aircraft recorded on a wire transcriber].

POINT I.

The Pilot of Appellee's Airplane Was Not Guilty of Negligence as a Matter of Law in Failing to See the Government Airplane Before the Collision.

The sole questions for determination by the trial court were whether defendant pilot Scott breached his duty of due care to the appellant and whether such breach was the proximate cause of the damage to appellant's airplane.

It is appellee's contention that the defendant pilot, Scott, exercised due care under the circumstances, and that the collision between the SBD airplane and the P-51 airplane was caused solely by the negligence of appellant's agents, Pitcairn, the pilot of appellant's airplane, and its employees in charge of the control tower. That defendant pilot Scott exercised due care under the circumstances is shown by a review of his conduct from the time he requested permission of the control tower to land at the Los Angeles Municipal Airport. When he was over the airfield prior to landing he radioed the control tower, gave them his position, requested and received landing instructions [R. 50, 55, 57, 117, 122]. After he landed on the 25-R runway as instructed, he proceeded to the north of the main runway [R. 50, 51, 59, 123-4, 136, 138, 142]. At the main runway he waited until another plane took off [R. 50-53, 58, 59, 123, 133, 136, 138, 142], and then received permission from the control tower to cross the main runway [R. 50, 51, 59, 117]. He hurried across the main runway to avoid any planes he had not seen because there were many planes around the field at his time [R. 53, 63, 64]. Then he commenced S-ing along runway 22 at fifteen degree angles, until his plane collided with appellant's airplane [R. 54, 64-66]. The

only evidence appellant produced from which negligence might be inferred is that defendant pilot Scott looked out of the cockpit window at the end of each "S" turn down the runway and did not see appellant's airplane parked thereon [R. 54, 67], and that the collision between the two airplanes took place [R. 54, 67, 77].

Considering this matter solely on the issue of negligence of defendant pilot Scott, the question for determination by the trial court was whether there was sufficient evidence to submit the question to the jury, or whether the evidence was so clear that the court could instruct the jury that defendant pilot Scott was guilty of negligence as a matter of law.

The test adopted by both the Federal and State courts in determining when to submit an issue of negligence to the jury is well-stated by the court in *Brinegar v. Green et ux.,* 117 F. (2d) 316, at page 319:

> "The determination of the existence of negligence where the evidence is conflicting or the undisputed facts are such that fair-minded men may draw different conclusions from them, is a question of fact for the jury and not one of law for the Court."

Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231;

Champlin Refining Co. v. Walker, 113 F. (2d) 844, 846;

Surdyk v. Indiana Harbor Belt R. Co., 148 F. (2d) 795, 797.

Applying this test to the following facts, it is submitted that fair-minded men may draw different conclusions on the question of whether or not defendant pilot Scott exercised due care under the circumstances:

(a) That defendant pilot Scott radio-ed and received landing instructions from the control tower before landing at Los Angeles Municipal Airport [R. 50, 55, 56, 57, 117, 122];

(b) That defendant pilot Scott was constantly in contact with the control tower requesting and receiving instructions as to where to proceed on the airfield [R. 50, 57-59, 117, 122, 123];

(c) That after receiving said instructions defendant pilot Scott adopted the procedure known as "S-ing" in taxi-ing along runway 22 [R. 53, 54, 64-66];

(d) That defendant pilot Scott carried out this "S-ing" procedure in an orthodox manner [R. 54, 64-66, 133, 136, 138];

(e) That the P-51 airplane was painted a brown Army khaki color which blended with the camouflaged runway, the brown dried grass alongside the runway, and the brown buildings and hills which formed a background in the direction defendant pilot Scott was looking as he landed the SBD airplane [R. 42, 62, 66, 71, 72];

(f) That defendant pilot Scott landed facing the sun [R. 62];

(g) That although the visibility and ceiling were unlimited there was some haze [R. 71].

In the light of these circumstances, especially the blending of the P-51 with the surrounding background it is clearly arguable that the P-51 airplane was invisible to defendant pilot Scott as he taxi-ed along the runway. At least such circumstances create such an uncertainty that reasonable persons could reach different conclusions on the issue of defendant pilot Scott's negligence. If so under the test set forth above it was a question of fact for the jury to decide and not a question of law for the court.

In Point I (A), page 8 of Appellant's Opening Brief, it predicates its appeal upon the doctrine that looking and not seeing something in plain sight constitutes negligence as a matter of law. The basic requirement of the application of this doctrine is that one actually sees the object in plain sight, or that one has a clear, unobstructed view so that he would be negligent in not seeing it.

Lasater v. Oakland Scavenger Co., 71 Cal. App. (2d) 217, 222, 162 Pac. 486;

Busch v. Los Angeles Ry. Co., 178 Cal. 536, 539, 174 Pac. 665;

Nichols v. Nelson, 80 Cal. App. 590, 595, 254 Pac. 648.

This doctrine is inapplicable to the instant case for the following reasons:

1. Defendant pilot Scott did not see appellant's airplane until his SBD airplane collided with it [R. 54, 75, 76, 77];

2. Defendant pilot Scott's view was not unobstructed. He proceeded along the runway by a procedure known as S-ing. (Accepted as a proper procedure for an air-

plane of this construction.) This consisted of traveling in a zig-zag course turning the airplane first to the right and then to the left in 15 degree turns. In this manner defendant pilot Scott had a direct view of the runway *only* at alternate intervals [R. 53, 54, 64, 65, 66];

3. It is arguable that appellant's airplane was not in plain sight of defendant pilot Scott as he proceeded along the runway, because of the following circumstances:

(a) That the P-51B airplane was small, built close to the ground, and painted a camouflage brown color [R. 42, 66];

(b) That the runway on which said collision occurred was painted a camouflage color, known as "Duke's Mixture" [R. 63];

(c) That the area to the right and left of the runway where this collision took place was covered with brown, dried grass [R. 43, 62];

(d) That the hills in the direction that defendant pilot Scott was looking were brown in color and rose over the level of the runway and airfield [R. 62];

(e) That the buildings blending with the hills in the background were black and brown in color [R. 62].

The above circumstances must be considered when determining the issue of negligence, and it is clear that under the test set forth in the *Brinegar* case (*supra*), fair-minded men could reasonably reach different conclusions on the question of whether defendant pilot Scott was negligent in not seeing the apellant's airplane.

In Point I (A), page 11, of Appellant's Opening Brief, appellant cites authorities supporting the principle

that where a person fails to see what is in plain sight and fails to maintain a proper lookout, such conduct is negligent. Appellant does not clearly state whether such conduct is negligence as a matter of law, or merely evidence of negligence from which a jury can determine that the defendant was negligent. As appellant's basic contention on this appeal is that defendant pilot Scott's failure to see appellant's airplane was negligence as a matter of law, these authorities will be considered as to whether they support this contention.

Examination of all of these authorities reveals that in every case the issue of negligence was submitted to the jury as a question of fact rather than the court determining it as a question of law. Appellant has failed to give this court one authority where the court has held that analogous facts to the instant case should have been taken from the jury and decided as a matter of law. Appellee admits that such conduct by defendant pilot Scott is a question of fact to be determined by a jury and feels that the District Court properly submitted this issue to the jury for its determination.

One of appellant's authorities, *White v. Davis,* 103 Cal. App. 531, 284 Pac. 1086, cited in support of the principle that where one fails to see what is in plain sight he is guilty of negligence as a matter of law, is helpful in supporting appellee's theory in that it is arguable whether appellant's airplane blended with the background so as to make it invisible. In the *White* case, plaintiff brought an action against the defendant trucking company for injuries caused by the negligence of its

driver in running into plaintiff while he was fixing a stranded car on the highway. Evidence showed that plaintiff had stopped his car in front of a stranded Ford car, left his lights on, and had gone back and was working on the Ford car when defendant's truck hit him. The court in commenting on the driver's testimony that he did not see the Ford car or the plaintiff, stated as follows at page 538:

> "Whether in the exercise of reasonable care, he should have seen these objects, or whether, in the condition thus created, the Ford was so obscured or so blended with the plaintiff's machine, that it could not be seen by the driver of the truck, in the exercise of reasonable diligence, are questions of fact."

Although the decision of the trial court was reversed on other grounds, it was affirmed on the question that the issues of negligence and contributory negligence were questions of fact for a jury to decide.

The definition of negligence set forth in Point I (A), page 8, of Appellant's Opening Brief, is an excellent one. However, appellee wishes to point out that although the cases cited thereunder affirm this principle, their facts are not analogous situations supporting appellant's basic contention that the issue of negligence is a question for the court to determine. In the cases of *Terrell v. Key Sytsem,* 69 Cal. App. (2d) 682, 159 P. (2d) 704, and *Toschi v. Christian,* 24 Cal. (2d) 354, 149 P. (2d) 848, the reviewing court reversed the ruling of the trial court granting defendant's motion of nonsuit,

and directed that the issues of negligence and contributory negligence were questions for the jury and not for the court.

In Point I (A), page 12 of Appellant's Opening Brief, it has set forth a quotation allegedly contained in the Court's opinion in *Williams v. Pacific R. R. Co.,* 177 Cal. 235, 170 Pac. 423. A thorough examination of the Court's opinion fails to reveal the language quoted by the appellant.

The other cases, *Chrissinger v. Southern Pacific Co.,* 169 Cal. 619, 149 Pac. 175; *Litlerbury v. Kimmet,* 183 Cal. 24, 195 Pac. 660 cited thereunder (App. Op. Br. p. 12), substantiate the principle set forth by Appellant that where the custom and standard of performing a particular act is so well established that any deviation from that standard may be declared negligence or contributory negligence as a matter of law. Both of these cases decided that the trial court properly granted defendant's motion for a non-suit, because plaintiff's conduct was contributory negligence as a matter of law. In the *Chrissinger* case plaintiff's conduct was a complete disregard for his duty to look or listen for an approaching train as he crossed a railroad track. The evidence showed that the train was in plain sight and plaintiff had a clear and unobstructed view along the track. In the *Litlerbury* case the defendant motorist's negligence consisted of making a left hand turn from a thoroughfare into an intersection in front of a bus in which plaintiff was riding, without giving a hand signal.

The trial court instructed the jury that defendant was negligent as a matter of law, and on appeal this ruling was affirmed.

The facts of the *Chrissinger* and the *Litlerbury* cases are clearly distinguishable from the facts before this court. Here, there is no evidence to show that defendant pilot Scott disregarded any well established standard of care as did the parties held responsible in those cases. On the contrary the record shows that defendant pilot Scott was very cautious from the time he first contacted the control tower requesting permission to land. Throughout the entire landing operation he was in constant contact with the control tower and followed its instructions implicitly [R. 50, 55-57]. The mere fact that he did not see Appellant's camouflaged airplane parked on a camouflaged runway and the fact that a collision resulted is surely not sufficient evidence of negligence to bring this case within the rule of these cases.

In *Woodhead v. Wilkinson,* 181 Cal. 599, 185 Pac. 851, the principle of negligence as a matter of law was not even considered by the court. As the case was tried without jury it is impossible to determine whether or not the court would have taken the issue of negligence from a jury. The court held that defendant was negligent in not sounding his horn and in driving negligently on the highway so as to injure plaintiff, a pedestrian, who was rightfully on the highway.

POINT II.

The Appellant Was Guilty of Such Contributory Negligence Which Would Support a Jury Verdict for the Defendant.

Negligence by the plaintiff which contributed to the injury is a defense in an action based upon negligence. This defense has been defined by the California Supreme Court in *Basler v. Sacramento Gas & Elec. Co.,* 158 Cal. 514, 111 Pac. 530, where the court states at page 519:

> ". . . the contributory negligence which will bar a recovery must be such as to establish that the person by failure to exercise the required amount of care proximately contributed to produce the injury complained of 'so that but for his concurring and cooperative fault the injury would not have happened' . . ."

See:

Straten v. Spencer, 52 Cal. App. 98, 197 Pac. 540; and

Restatement of Torts, Secs. 463, 464, 466.

The issue for determination by this Court is whether the District Court erred in overruling plaintiff's motion for an instructed verdict that the appellant was not guilty of contributory negligence. Appellee contends that there is ample evidence to sustain a verdict that plaintiff was guilty of contributory negligence and that the trial court was correct in submitting this case to the jury on the issue of contributory negligence.

The question of when contributory negligence is an issue of fact or an issue of law is, in many instances, a

close one. In *Snipes v. Southern Railroad Company,* 166 Fed. 1, at page 5, the Circuit Court of Appeals, in reversing the action of the District Court in taking the case from the jury, affirmed the language by the Supreme Court of the United States in *Richmond & Danville R. R. Co. v. Powers,* 149 U. S. 43, 13 Sup. Ct. 748, which reads as follows:

> "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fairminded men will honestly draw different conclusions from them."

See:

Surdyk v. Indiana Harbor Belt R. Co., 148 F. (2d) 795, 797;

Dryfoos v. Scavenger Service Corp., 115 F. (2d) 637, 639; and

Malone v. Suburban Transit Co., 64 Fed. Supp. 859, 863, affd. 156 F. (2d) 422.

Applying this test to the case at hand on the issue of contributory negligence, and assuming but not admitting, the facts are undisputed, it can clearly be seen that this case is the type upon which "fair-minded men will honestly draw different conclusions from them" as to whether or not the appellant was contributorily negligent.

It is appellee's contention that this record shows ample evidence from which a jury could reasonably find that appellant was guilty of contributory negligence. The following are specific facts of appellant's conduct which substantiate this conclusion:

(a) That Appellant's agent Pitcairn, the pilot of the P-51 airplane, parked it on runway 22 of the Los Angeles Municipal Airport knowing that other airplanes were using said runway for taxi-ing [R. 44, 67, 77];

(b) That Appellant's agent Pitcairn, the pilot of the P-51 airplane, knowingly disobeyed the order of Appellant's agents in charge of the control tower to immediately proceed to the parking place on runway C [R. 77, 116, 118];

(c) That Appellant's agent Pitcairn, the pilot of the P-51, could have parked his airplane just off the runway in the grass which was level, to his right and thus avoided the accident [Tr. pp. 43-77];

(d) That Appellant's agents in charge of the control tower of the Los Angeles Municipal Airport permitted Pitcairn, the pilot of the P-51 airplane, to remain on runway 22 knowing that other airplanes were using said runway, defendant pilot Scott in particular [R. 116, 118-121];

(e) That Appellant's agents in charge of the control tower, knowing that said P-51 airplane was parked on runway 22, and knowing the SBD plane of appellee was so constructed that the pilot could not see forward and knowing the buildings, runway, and the P-51 were camouflaged, and blended with the color of the grass on the airfield, and the surrounding hills, and that the SBD plane

of appellee was headed into the sun, ordered defendant pilot Scott to taxi his SBD airplane along said runway to runway C, the parking area [R. 117-121];

(f) That appellant's agents in charge of the control tower failed to warn the defendant Scott, pilot of the SBD airplane, that the P-51 airplane was parked on runway 22 [R. 117, 118];

(g) The usual custom was to move all airplanes off the runways immediately after their landing but this was not done by Appellant [Tr. p. 42].

(h) That appellant's agents, who were admittedly in charge of the control tower, failed to make sure a tow truck was immediately sent to remove the P-51 airplane from said runway [R. 77, 118, 121].

Even though appellant's contributory negligence consisted only of Pitcairn's conduct in knowingly parking the P-51 airplane on the runway, as described in item (a) and (b) above, it is submitted that such facts would come within the test set forth in the *Snipes* case (*supra*) is such that fair-minded men could honestly draw different conclusions on the issue of contributory negligence by the appellant. That Pitcairn's conduct was lack of due care is substantiated by his own statement to defendant Scott. Defendant Scott testified at page 77 of the Transcript of Record that he had the following conversation with Pitcairn about one or two minutes after the collision (Scott speaking):

> "The first thing he said, 'I am glad you cut the switch,' because I was well on the way of cutting him up. And when he finally got out I said, 'I am sorry. I didn't see you.'

"Well, he said, 'I am sorry. I had no business being here. I have been here for about 10 minutes. I called for a truck and they haven't come after me yet.'" [R. 77.]

In this case the Court had not only Pitcairn's conduct to consider, but in addition the conduct of the appellant's agents in charge of the air traffic control tower. (See (d) to (g), inclusive, *supra.*) As they had both the duty and the authority to control the air traffic and ground traffic by airplanes around the airfield [R. 101, 102, 103, 128], it is reasonable to assume that in the proper performance of their duties they, knowing the P-51 airplane was parked thereon, would not have permitted defendant Scott to have proceeded along runway 22. Appellant's agents had full view of both defendant Scott's S.B.D. airplane and the P-51 airplane [R. 118, 121] and should have taken precautions to either remove the P-51 airplane or have advised defendant pilot Scott of its presence on said runway. The evidence showed that while in the air, Pitcairn requested a truck to tow the P-51 airplane to the proper parking place [R. 118, 122]. In proper performance of their duties as efficient control tower operators, appellant's agents should have had said truck there to remove said P-51 airplane when it landed, as it was foreseeable that its presence on runway 22 would create a hazard and cause a collision of the type which resulted.

For these reasons, appellee submits that the trial court would have committed a gross error to remove the case from the jury on the issue of contributory negligence.

On pages 13 and 14 of Appellant's Opening Brief, it contends that since the test of the P-51 airplane was conducted under the usage and custom in effect at the time

of this collision, that such usage and custom was a proper standard of due care so that upon appellant's compliance therewith its conduct could not be contributory negligence. Appellant confuses the issue of due care with the effect of custom and established procedure. In other words, appellant assumes that habitual course of conduct cannot possibly be a negligent course of conduct. If appellant were correct in this respect then habitual negligence even of an individual, would relieve him of the consequences of his acts. This view is clearly erroneous because the law is clear that a habitual course of conduct must meet the standards of due care as must any other course of conduct.

An authoritative statement by the California Supreme Court affirming this conclusion is contained in *Robinet v. Hawks,* 200 Cal. 265, at page 273 (252 Pac. 1045):

> "In the first place the doctrine of customary usage does not, to our knowledge, apply to the question of legal duty under the law of negligence. In *Perry v. Angelus Hospital Assn.,* 172 Cal. 311, 315 we say: 'We know of no authority for the proposition that by continuing in a careless performance of duty a party transforms its negligence into due care.'"

The *Robinet* case has been affirmed in the following cases:

Sheward v. Virtue, 20 Cal. (2d) 410, 414, 126 P. (2d) 345;

Neel v. Mannings, 19 Cal. (2d) 647, 655, 122 P. (2d) 576;

Milton v. Los Angeles Motor Coach Co., 53 Cal. App. (2d) 566, 570, 128 P. (2d) 178.

On page 14 of Appellant's Opening Brief, it states that there was no duty upon the part of the operators of the

control tower to notify taxiing airplanes of objects on the runway they were using. Surely this is a question for the jury under all the circumstances. Defendant pilot Scott testified it was customary and that on previous occasions when taxiing on the runways he had been warned of airplanes parked thereon [R. 70]. Also Thomas E. Buckles, the operator in charge of the control tower at the time of this collision testified that sometimes the control tower notified the pilots of the taxiing airplanes of obstructions in the runways and sometimes they did not [R. 127]. In the light of such an inconsistent procedure it is surely arguable that the control tower, having complete control of both ground and air traffic, violated its duty of due care in instructing a pilot of an S.B.D. airplane to use a runway on which another airplane was parked without warning the pilot of its presence thereon. If so, it is a question for the jury to decide. This is peculiarly true since appellee's pilot could not see forward in his plane and had only a limited vision by "S" ing and the tower was familiar with this plane.

On page 13 of Appellant's Opening Brief it cites cases affirming the principle that contributory negligence becomes a question of law when the evidence is such that reasonable men can reach only one conclusion. Examination of these cases reveal that they are either distinguishable on their facts from the instant case or are not authority for this principle. Each case will be considered individually as follows:

In *Hamlin v. Pac. Elec. Ry. Co.,* 150 Cal. 776, 89 Pac. 1109, the trial court held that plaintiff's conduct of riding a bicycle along the railroad track of defendant railway company was such a violation of a well-established stand-

ard of due care as to constitute contributory negligence as a matter of law. On appeal, the judgment of the trial court for the defendant was affirmed. Comparing this conduct to that of defendant pilot Scott's in the instant case, it is clear that the situations are not analogous. Defendant pilot Scott was proceeding along the runway where he had a right to be, and where Appellant, in whose charge he was, ordered him to go, whereas, in the *Hamlin* case the plaintiff had no right whatsoever to be on the railroad track.

In *Reaugh v. Cudahy Packing Co.,* 189 Cal. 335, 208 Pac. 125, the trial court granted defendant's motion for non-suit on the ground that plaintiff was contributorily negligent in failing to see defendant autoist who was in plain sight as she crossed a street in downtown Los Angeles. On appeal, the Supreme Court reversed this ruling and held that this matter should have been submitted to the jury on the issues of both negligence and contributory negligence. In other words, this case rejects the principle that contributory negligence under such circumstances was a question of law for the Court affirms appellee's contention that it was a question of fact for the jury.

In *Young v. Southern Pac. Co.,* 182 Cal. 369, 190 Pac. 36, the trial court instructed the jury to find plaintiff guilty of contributory negligence as a matter of law. Plaintiff's conduct consisted of attempting to cross the main track of a railroad at a crossing, although his view was obstructed by cars standing on another track, without the slightest effort to stop or look or listen, and without giving any heed to the warning of bells, whistles or shouts of bystanders. Appellee agrees that in such a situation plaintiff would be guilty of contributory negligence as a matter of law. However, the facts in the instant case are

so clearly distinguishable from the *Young* case that appellee feels it is not necessary to comment thereon.

In *Minter v. San Diego Consol. Gas & Elec. Co.,* 180 Cal. 723, 182 Pac. 749, the trial court granted defendant's motion to non-suit the plaintiff on the ground that there was no evidence of negligence by the defendant in the maintenance of insulated electric wires in the upper part of a tree in front of plaintiff's premises. Plaintiff's son was electrocuted while working near the wires in the tree. The Supreme Court affirmed the judgment for the defendant, but rejected defendant's argument that plaintiff was contributorily negligent as a matter of law and commented that the question of plaintiff's negligence would have been properly a question of fact for the jury. Thus, under this authority, appellee's contention would be sustained.

On page 12 of Appellant's Opening Brief it cited *Williams v. Pac. Elec. Railroad Co.,* 177 Cal. 235, 170 Pac. 423, in support of the principle that where the standard of care is so clear that reasonable person could reach only one conclusion on the issue of contributory negligence such issue was for the Court to determine rather than for the jury. This case is authority for appellee's contention in the instant case rather than for appellant's, because the Supreme Court specifically rejected the argument that the conduct of plaintiff constituted contributory negligence as a matter of law and held that such conduct should be submitted to the jury as a question of fact.

On page 16 of Appellant's Opening Brief, it cites several cases as authority for the principle that where but one deduction can be drawn from the evidence the question of proximate cause is one of law only. Appellee agrees with

this principle of law, but contends that it is inapplicable to the facts in the instant case. Here the evidence shows that Appellee's pilot, Pitcairn, knowing runway 22 was used by other airplanes, parked thereon in violation of the custom of keeping the runways clear and in violation of the order of the tower to proceed to the ramp, and rather than moving off the runway to the side or posting himself as a guard to prevent a collision. This conduct could well be construed by a reasonable person as a lack of due care and negligence contributing to this collision. Further, Appellant's agents in the tower, knowing that the P-51 airplane was parked on runway 22, and that the pilot in Appellee's plane could not see forward from it, ordered defendant pilot Scott to taxi the SBD airplane along said runway without warning him of the parked P-51 airplane. Such conduct under all the circumstances is clearly evidence of contributory negligence and was properly submitted to the jury as a question of fact for its determination.

The authorities cited in support of this principle have been examined and are either distinguishable from the instant case on their facts or not authority for the cited principle.

In *Zibbell v. Southern Pacific Co.,* 160 Cal. 237, 116 Pac. 513, the defendant appealed from a judgment for the plaintiff entered pursuant to a jury verdict in his favor. Defendant argued that the trial court erred in not instructing the jury that plaintiff was contributorily negligent as a matter of law. The court affirmed the judgment of the lower court and rejected defendant's argument in the following language at page 241:

> " 'It is only where no fact is left in doubt, and no deduction or inference other than negligence can be

> drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' (Citing cases.)"

On page 16 of Appellant's Opening Brief it has set forth an excellent definition of proximate cause. Applying the facts of the instant case to this definition, it is clear that if appellant's agent, Pitcairn, had refrained from parking on runway 22 when he knew other planes were using it; or if appellant's agents in charge of the control tower had warned defendant pilot Scott of the presence of the P-51 airplane so that he could have avoided colliding with it; or if appellant's agents in charge of the control tower had organized a system whereby the tractor would have been sent to meet the P-51 airplane as soon as Pitcairn requested landing instructions, this collision could have been averted. Thus, under this definition of proximate cause, appellant's conduct could clearly be construed as being a proximate cause of the collision in the instant case. At least it is sufficiently arguable that the issue should be submitted to a jury as a question of fact rather than be determined by the Court as a question of law.

In *Flores v. Fitzgerald,* 204 Cal. 374, 268 Pac. 369, the issue of when contributory negligence is a question of law was discussed, but the Supreme Court held that on the evidence presented the trial court correctly submitted the issue to the jury as a question of fact, and affirmed the lower court's judgment for the plaintiff.

In *Donegan v. Baltimore & N. Y. Ry. Co.,* 165 Fed. 869, the Court affirmed the principle for which it is cited,

but held that on the evidence presented the matter was a question for the jury. It is submitted that this case is not authority for the appellant's contention in the instant case.

In *Winters v. Baltimore & Ohio Ry. Co.,* 177 Fed. 44, 100 C. C. A. 462, the trial court granted the defendant's motion for directed verdict on the ground that the evidence showed plaintiff was guilty of contributory negligence as a matter of law. On appeal, the reviewing court reversed the trial court's ruling, saying that the evidence on the issues of negligence, contributory negligence and proximate cause was such that the trial court erred in not submitting these issues to the jury as a question of fact for its determination.

It is submitted that this authority supports appellee's contention in this matter rather than appellant's.

In *Hales v. Michigan Central Ry. Co.,* 200 Fed. 533, 188 C. C. A. 627, the trial court granted a directed verdict for the defendant on the ground that there was insufficient evidence to go to the jury. On appeal, this ruling was reversed because in the opinion of the reviewing court, the evidence should have been submitted to the jury. Again, this case is not authority for the principle that proximate cause in the instant case should be determined by the Court as a matter of law.

In *San Francisco & P. S. S. Co. v. Carlson,* 161 Fed. 851, 89 C. C. A. 45, the defendant appealed from a jury verdict in favor of the plaintiff and the reviewing court held that the case had been properly submitted to the jury on all issues. Likewise, this case is not an authority for the contention that the issue of proximate cause in the

instant case should have been decided by the Court as a matter of law.

In *Jennings v. Davis,* 187 Fed. 703, 109 C. C. A. 451, the plaintiff, an adjoining landowner, brought action against the defendant, owner of an oil pipe line, for destruction of plaintiff's property. Evidence showed that defendant's pipe line had sprung a leak, causing the oil to seep underneath the plaintiff's property and also that of a blacksmith shop next door. The following morning the blacksmith started a fire in his shop and dropped a piece of red hot iron through the floor boards into the oil which started the fire, destroying plaintiff's building. The trial court refused to instruct the jury that the act of the blacksmith might be an intervening cause so that defendant's conduct would not be the cause of plaintiff's injury. The jury returned a verdict for the plaintiff. On appeal, the reviewing court reversed the ruling of the trial court, holding that the act of the blacksmith was clearly the proximate cause of plaintiff's injury so that judgment should have been for the defendant as a matter of law. Comparing these facts to the instant case, it is clear that they are distinguishable. No where in the instant case is there any conduct which might be construed as an intervening cause. Viewed most strongly against the appellee, the only possible acts of the parties which could have caused this collision were: negligent conduct by defendant pilot Scott; negligent conduct by appellant's pilot, Pitcairn; or negligent conduct by appellant's agents in charge of the control tower. It is submitted that the issue of proximate cause in the instant case is clearly one for the jury to determine, and the trial court correctly submitted this case to the jury on all issues.

POINT III.

The Trial Court Was Correct in Overruling Appellant's Motion for a Directed Verdict, and Its Ruling Should Be Affirmed.

In reviewing the trial court's ruling of refusing to direct a verdict, it is the duty of the reviewing court to view the evidence and all inferences reasonably drawn therefrom in the light most favorable to the plaintiff. Even though this court would disagree with the conclusion reached by the jury in the trial court, it is not within its province to reverse the finding of the jury on that ground.

The scope of the determination of a reviewing court is well-stated in the case of *Champlin Refining Co. v. Walker,* 113 F. (2d) 844, where the Court states at page 846:

> "In reviewing the ruling of the lower court on a motion for a directed verdict, the question presented is whether or not there was substantial evidence to sustain a verdict. In determining that question, we must accept as true the evidence favorable to the party against whom a directed verdict has been sought, and he is entitled to the benefit of all favorable inferences that may reasonably be drawn therefrom. If the evidence so considered was such that reasonable men might reach different conclusions, then the case was one for the jury."

This same conclusion is reached in the following cases:

Surdyk v. Indiana Harbor Belt R. Co., 148 F. (2d) 795, 797; and

Malone v. Suburban Transit Co., 64 F. Supp. 859, 863.

POINT IV.

The Evidence Is Sufficient to Sustain the Verdict of the Jury.

The duty of a reviewing court in considering the question of whether the evidence is insufficient to sustain the verdict of a jury is much different than that of the jurors in reaching such a verdict. The reviewing court is not permitted to weigh the evidence, but can only determine whether there is sufficient evidence from which a jury could reach such a verdict. If there is a sufficient amount of evidence, then the verdict of the jury must be affirmed.

In *Dryfoos v. Scavenger Service Corporation,* 115 F. (2d) 637, the court states the province of the reviewing court in the following language at page 640:

> "The law, however, is not an exact science, and its processes cannot always be measured with that certainty which we might desire. We should like to feel morally certain that no wrong is to be done by requiring the payment of damages, but this is not the degree of proof that the law exacts in a civil suit. There is substantial evidence here leading to the conclusion expressed by the jury's verdict, and under such circumstances our duty is plain. Even though we may disagree with the result reached by the jury we have no right to substitute our judgment for theirs on this question of fact. We are constrained, therefore, to hold that the record presents a jury question on the subject of causal connection."

See:

Scroggs v. American Stove Co., 142 F. (2d) 297, 299.

Applying the above language to the facts in the instant case, it is submitted that the evidence presented herein both on the issues of negligence and contributory negligence are ample to support the jury's verdict. Therefore, the appellant's appeal on the ground that the evidence is insufficient to sustain the verdict of the jury should be dismissed.

Conclusion.

It is respectfully submitted that there is no basis for appellant's contention that the evidence on either the issue of negligence or that of contributory negligence is such that the trial court could rightfully decide either issue as a matter of law rather than submitting it to the jury as a question of fact. For that reason, appellee contends that the trial court was correct in submitting this case to the jury and in overruling plaintiff's motion for judgment or a new trial. It is respectfully submitted that the judgment of the District Court be sustained.

Respectfully submitted,

James V. Brewer,
Attorney for Appellees.